

BOARD OF APPEALS  
for  
MONTGOMERY COUNTY

Stella B. Werner Council Office Building  
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Rockville, Maryland 20850  
(240) 777-6600

[www.montgomerycountymd.gov/content/council/boa/board.asp](http://www.montgomerycountymd.gov/content/council/boa/board.asp)

**Case No. S-2603**

**PETITION OF RHODA MOORE**

OPINION OF THE BOARD

(Public Hearing Date: June 14, 2004)

(Opinion Adopted July 14, 2004)

(Effective date of Opinion: August 3, 2004)

Case No. S-2603 is an application for a special exception pursuant to Section 59-G-2.00 (Accessory Apartment) of the Zoning Ordinance to permit an existing accessory apartment. Pursuant to the authority in Section 59-A-4.125 of the Zoning Ordinance, the Board of Appeals referred the matter to the Hearing Examiner for Montgomery County to conduct a public hearing and render a written report and recommendation to the Board for approval. The Hearing Examiner convened a hearing on June 14, 2004, and on June 30, 2004, issued a report and recommendation for approval of the special exception. On July 2, 2004, the Hearing Examiner submitted a memorandum to the Board to supplement the information in the special exception record about the number of active special exceptions in the neighborhood of the subject property.

The subject property is Lot 8, Block 64, Subdivision 3, located at 626 Potomac Avenue, Silver Spring, Maryland, 20910, in the R-60 Zone.

Opinion of the Board:                      Special exception granted subject  
to conditions enumerated below.

The Board of Appeals considered the Hearing Examiner's report and recommendation at its Worksession on July 14, 2004. After careful consideration and review of the record, the Board adopts the report and recommendation and **grants** the special exception, subject to the following conditions:

1. The Petitioner is bound by Petitioner's testimony, representations and exhibits of record, to the extent that such testimony and evidence are identified in the Hearing Examiner's Report and Recommendation and in the opinion of the Board.
2. The Petitioner is bound by the conditions set out in the Memorandum of Wright A. Jolly, Jr., Housing Code Inspector, Division of Housing and Code Enforcement (Exhibit 11), that Petitioner will house no more than two persons in the accessory apartment; will install a stove with an oven in the kitchen; will install a guardrail with balustrades around the front entrance stairwell; and will properly support and secure the

loose counter and counter top.

3. Petitioner must occupy one of the dwelling units on the lot on which the accessory apartment is located; and

4. Petitioner must not receive compensation for the occupancy of more than one dwelling unit.

On a motion by Donna L. Barron, seconded by Louise L. Mayer, with Angelo M. Caputo, Allison Ishihara Fultz and Donald H. Spence, Jr., Chairman in agreement, the Board adopted the following Resolution:

**BE IT RESOLVED** by the Board of Appeals for Montgomery County, Maryland that the record in Case No. S-2603 is re-opened to receive the Hearing Examiner's memorandum dated July 2, 2004; and

**BE IT FURTHER RESOLVED** by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

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Donald H. Spence, Jr.  
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 3<sup>rd</sup> day of August, 2004.

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Katherine Freeman  
Executive Secretary to the Board

**NOTE:**

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four months' period within which the special exception granted by the Board must be exercised.



**BEFORE THE MONTGOMERY COUNTY  
BOARD OF APPEALS**  
Office of Zoning and Administrative Hearings  
Stella B. Werner Council Office Building  
Rockville, Maryland 20850  
(240) 777-6660

**IN THE MATTER OF:  
RHODA MOORE,**

Petitioner

Rhoda Moore

For the Petition

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Wright A. Jolly, Jr.  
Department of Housing and  
Community Affairs

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Board of Appeals Case No. S-2603  
(OZAH Referral No. 04-37)

Before: Martin L. Grossman, Hearing Examiner

## HEARING EXAMINER'S REPORT AND RECOMMENDATION

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## I. STATEMENT OF THE CASE

Petition No. S-2603, filed on January 29, 2004, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an accessory apartment use in a single-family residential structure located at 626 Potomac Avenue, Silver Spring, Maryland 20910. The subject property is designated Part of Lot 8, Block 64, in the subdivision known as B.F. Gilbert's Addition to Takoma Park. It is zoned R-60, and the Tax Account No. 00988143.

On March 5, 2004, the Board of Appeals issued a notice that a hearing in this matter would be held before the Office of Zoning and Administrative Hearings on June 14, 2004, at 9:30 a.m., in the Second Floor Hearing Room of the Stella B. Werner Council Office Building.

The Department of Housing and Community Affairs inspected the property on May 26, 2004, and reported the following issues in a memorandum dated June 2, 2004 (Exhibit 11):

1. Install a stove with an oven in the kitchen.
2. Based on the square footage of the unit, the accessory apartment may be occupied by no more than two persons.
3. Install a guardrail with balustrades around the front entrance stairwell.
4. Properly support and secure the loose counter and counter top.
5. The ceiling height did not meet the minimum requirements, however a review by the Modification Advisory Committee (DPS) indicated that no modification was necessary based on the age and history of the dwelling unit.

Technical Staff at the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a report issued June 10, 2004, recommended approval of the special exception, with conditions. (Exhibits 12 and 12(a)).<sup>1</sup>

A public hearing was convened as scheduled on June 14, 2004, and Petitioner Rhoda Moore appeared *pro se*. Also attending was Wright A. Jolly, Jr., Housing Code Inspector of the Department of Housing and Community Affairs. Testimony was received from Petitioner and Housing Code

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<sup>1</sup> Technical Staff reports are frequently quoted and paraphrased herein.

## II. FACTUAL BACKGROUND

As noted above, the subject property is located at 626 Potomac Avenue, Silver Spring, Maryland 20910. The property is designated Part of Lot 8, Block 64, in the subdivision known as B.F. Gilbert's Addition to Takoma Park. It is zoned R-60 (Residential, one-family, detached). The residence in question is located on the southwest side of Potomac Avenue, between Piney Branch Road and Takoma Avenue, as depicted in the Zoning Map (Exhibit 8):



According to the Technical Staff, the subject site is approximately 10,886 square feet, rectangular and fairly level. The lot has a street frontage of approximately 50 feet along Potomac Avenue, and the house was built in 1942. The Housing Code Inspector, Wright A. Jolly, Jr., testified that Petitioner's landscaping was beautiful, and "it's got to be the best in the community. . . ." Tr. 24. The home is depicted in a photo supplied by Petitioner (Exhibit 9(a), top photo)<sup>2</sup>:



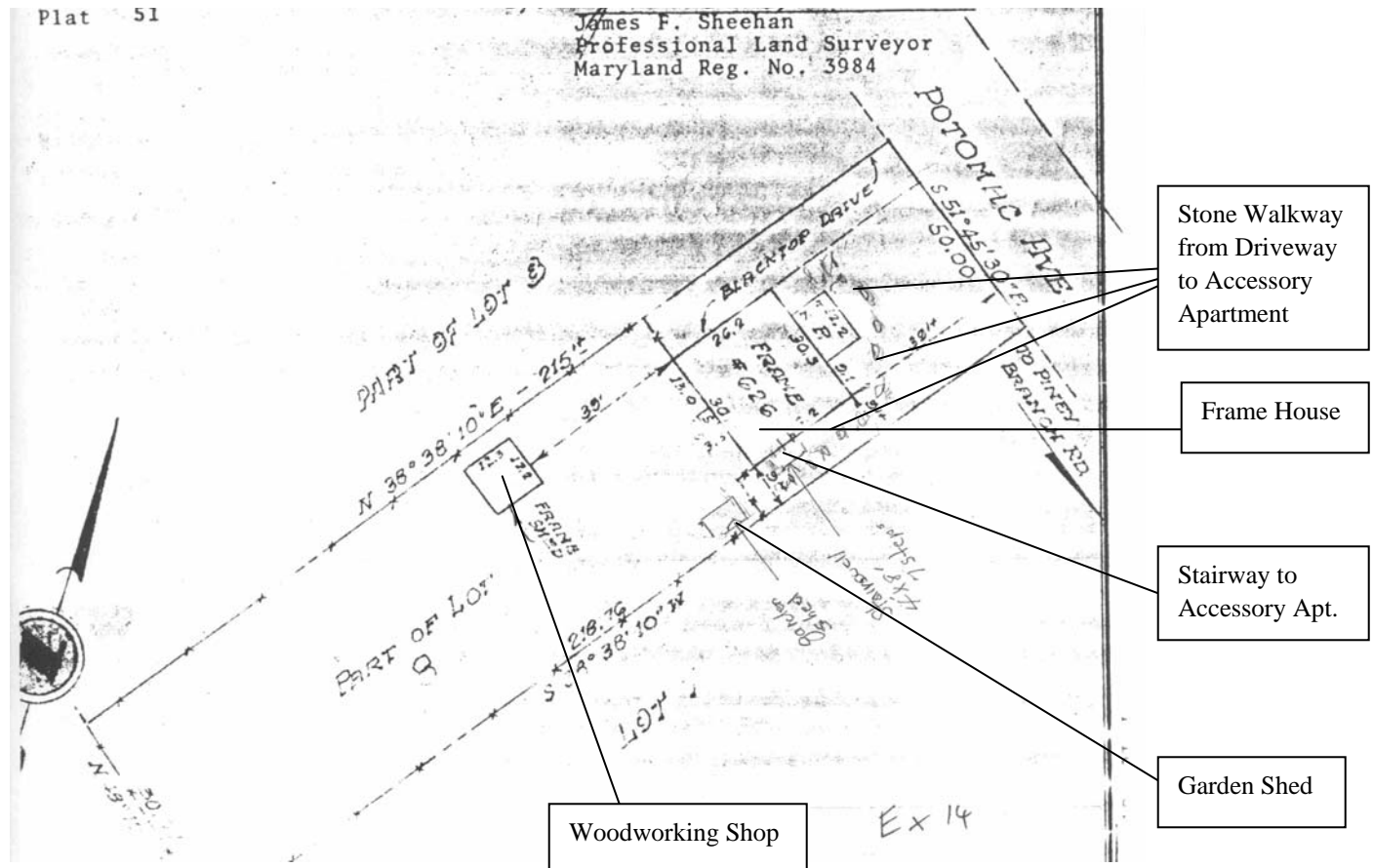
The property is well-described in the Technical Staff report as,

a one-story frame home with a front porch, full basement, and rear patio; an accessory apartment located in part of the basement, with access from external stairs located on the (southeast) side of the house; a shared "house laundry room and storage" area in the remainder of the basement; an extensively landscaped front and back yard; a garden shed in the rear yard; a small shed used as a woodworking shop in the rear yard; a fenced rear yard; a fence along the (northwest) side property line; a paved driveway that has an apron of about 12 feet, and aisle of about 10 feet, and that is long enough to accommodate three cars; and a pathway of paving stones leading from the driveway to the accessory apartment entrance.

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<sup>2</sup> Petitioner testified at the Hearing that, although the photos shown in Exhibits 9(a) and (c) were taken some years ago, they accurately depict the home as it exists today, except for the growth of shrubbery. The handwritten caption is Petitioner's.

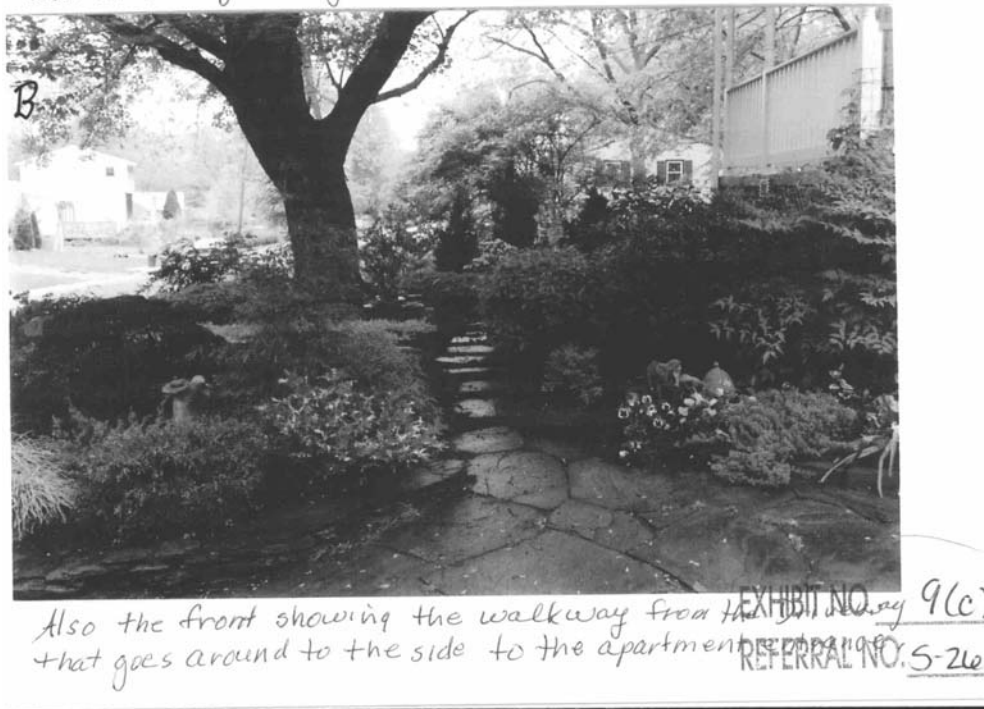
Technical Staff had suggested in their report that a revised floor plan and a revised site plan had to be submitted (Exhibit 12, Condition 3), but Staff changed that recommendation in an e-mail to the Hearing Examiner (Exhibit 12(a)) received on June 10, 2004, with the Technical Staff report. In that e-mail, Technical Staff stated that a revised floor plan was not needed, and instead of using the original Site Plan (Exhibit 4(b)), Petitioner should use the surveyor's plat (Exhibit 4(a)) and just add to it the location of the garden shed, the stairway to the accessory apartment entrance and the pathway from the driveway to the accessory apartment. Petitioner has done so, and the relevant portion of her revised House Location Plat (Exhibit 14) is shown below:





### B. The Proposed Use

The proposed accessory apartment is located in the basement of the house and has a separate entrance on the side of the home. It is approached by a stone walkway which begins at the paved driveway. A portion of the stone walkway to the accessory apartment is depicted below in the bottom photo from Exhibit 9(c).

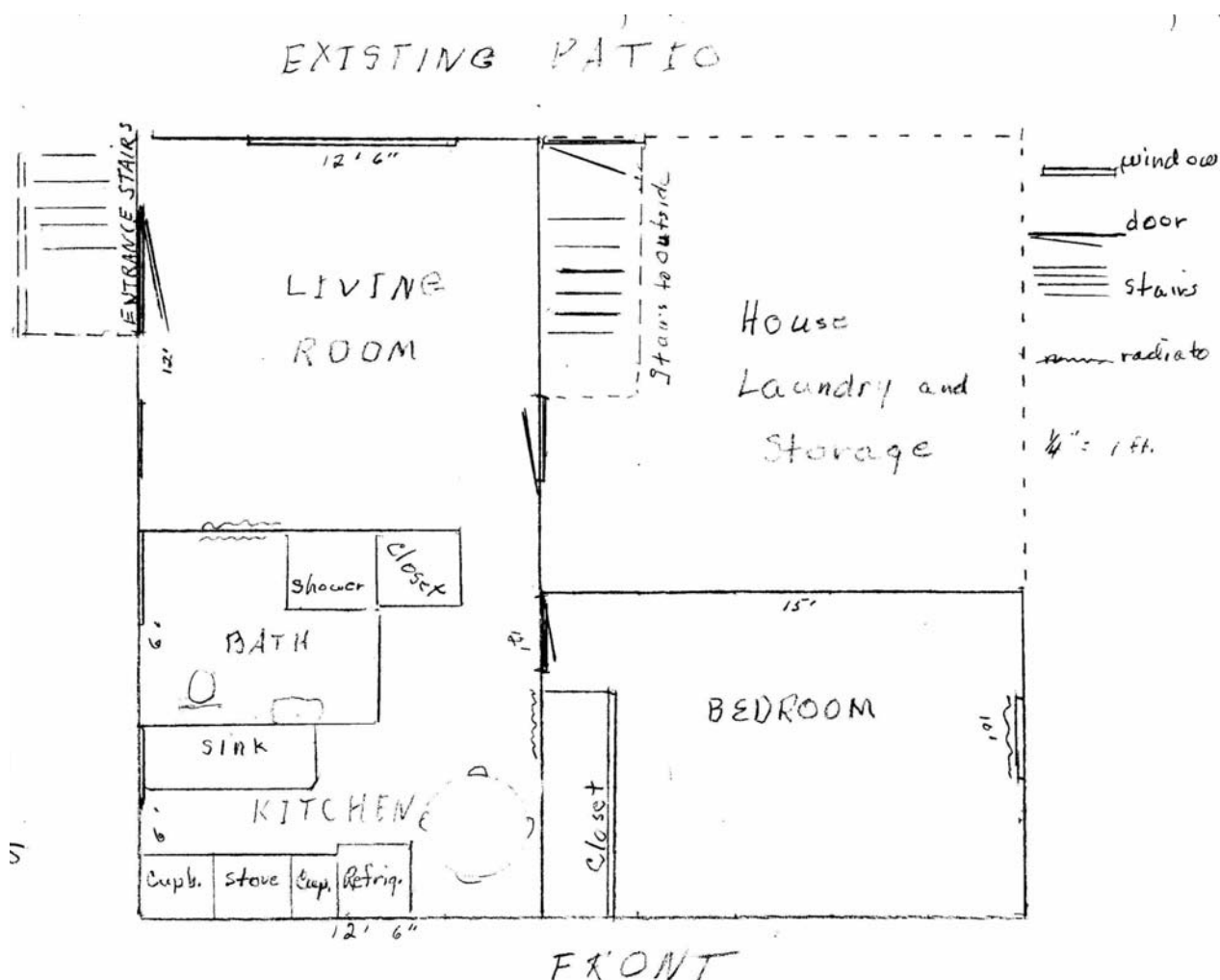


The accessory apartment contains a living room, a kitchen, a bathroom and a bedroom all of which occupy about 450 square feet, according to Technical Staff. Also in the basement is the house's laundry and storage area. The Housing Code Inspector's Report indicates that the accessory apartment may be occupied by no more than two individuals and that Petitioner will need to repair a loose counter and install a stove with an oven in the kitchen and a guardrail with balustrades around the entrance steps. Mr. Jolly also noted that the ceiling height in the accessory apartment is not up to the 7 feet required by Section R-305 of the 2000 International Residential Code (IRC); however, Petitioner, after a hearing, received a waiver from Department of

Permitting Services, based on a recommendation of the "Modification Advisory Committee."

That Committee based its decision on Montgomery County Policy # P 02-2, which "allows finished basements in single family dwellings that are at least 1-year old to have a minimum 6'-8" ceiling height." The height in the subject accessory apartment is at least 6 feet, 9 inches. A copy of the waiver is attached to both the House Code Inspector's Report (Exhibit 11) and Petitioner's Exhibit 3.

The accessory apartment Floor Plan (Exhibit 6) is shown below:



Technical Staff found that the Floor Plan is sufficient, and the Hearing Examiner agrees.

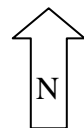
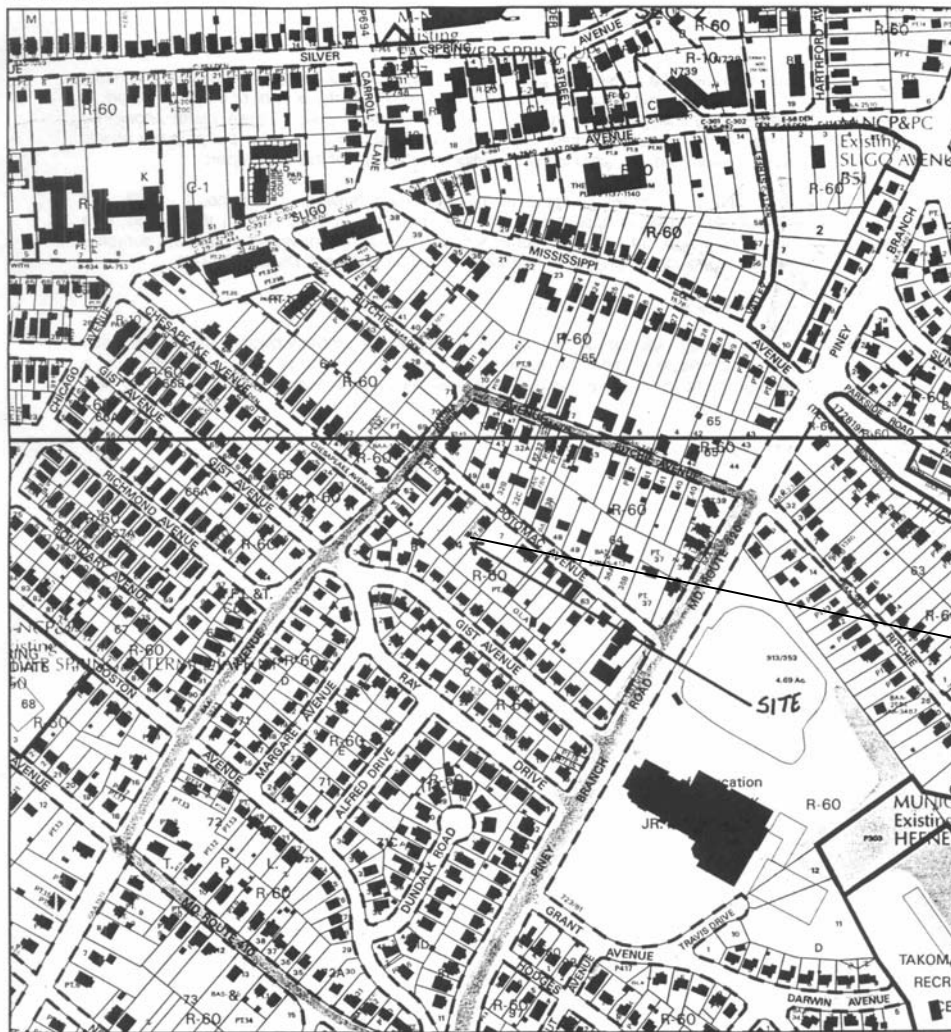
Staff also found that parking was adequate. The driveway has room for three cars, and only two

on-site spaces are required. Further, parking is allowed on the far side of the street, and it is not excessively used since all the houses on the block have driveways. The Housing Code Inspector also testified that there was plenty of parking available in the neighborhood. Tr. 19.

### C. The Neighborhood and its Character

The neighborhood is residential in character and consists of mainly one family homes, on land zoned R-60. Technical Staff defined the neighborhood as “that area bounded by Philadelphia Avenue (Md. Route 410) to the south, Takoma Avenue to the west, Ritchie Avenue to the north, and Piney Branch Road (Mad. Route 320) to the east. The area of the neighborhood as defined is, very roughly, about 55 acres. The Hearing Examiner accepts that definition, and the defined neighborhood is depicted below on a map that was attached to the Technical Staff report.

S-2603



Subject  
Property

There has been no opposition from the neighborhood to the instant petition.

According to Technical Staff, the following properties in the defined neighborhood were the subject of special exception applications:

S-2256	Accessory apartment, 617 Ritchie Avenue, approved 3/21/1997.
S-1789	Accessory apartment, 621 Potomac Avenue, approved 7/2/1990, notice to show cause revocation of special exception 8/9/1995.
S-415	Private educational institute, 609 Potomac Avenue, approved 8/5/1975, revoked as abandoned 4/12/2004. (Case mistakenly labeled S-413 on zoning map.)
S-696	Expansion of S-415 above, same property, approved 7/26/1991, apparently revoked pursuant to revocation of S-415 above.
S-1000	Accessory apartment, 501 Margaret Avenue, approved 9/19/1984.
S-2000	Accessory apartment, 405 Boston Avenue, approved 9/14/1993.

#### **D. The Master Plan**

The subject property is covered by the *East Silver Spring Master Plan, Approved and Adopted in December 2000*. As noted by Technical Staff, an important goal of the Plan is to “preserve existing residential character, encourage neighborhood reinvestment, and enhance the quality of life throughout East Silver Spring” (page 21). An accessory apartment does help preserve the residential character of the neighborhood and encourages residents to reinvest in their own property.

Although the Master Plan does not explicitly address accessory apartments, it does recommend, in general, confirming the existing residential zoning and retaining “the existing single-family detached character throughout most of East Silver Spring. . . .” (Page 26) Because Petitioner plans no external structural modifications to the subject property, the requested special exception will maintain the residential character of the area. Thus, it is fair to say that the planned use, an accessory apartment in a single family detached home, is not inconsistent with the applicable *Master Plan*.

In this connection, Technical Staff (Exhibit 13) also quoted a recent study by the M-

NCPPC noting that:

[accessory apartments] can be an excellent solution to the shortage of affordable housing by producing extra income for homeowners, dispersing the supply of moderate-cost housing more uniformly throughout the community, contributing to the tax base, reducing sprawl by providing more concentrated urban housing opportunities, and providing a means for extended family members to live together in a single site. (Housing Montgomery: A Menu of Options for a Dramatic Increase in the Supply of Housing for our Workforce, 3/6/03, Montgomery County Planning Board Agenda Item #1)

### **III. SUMMARY OF HEARING**

At the June 14, 2004 hearing, testimony was heard from Petitioner and from Housing Code Inspector Wright A. Jolly, Jr.

In questioning by the Hearing Examiner, Petitioner testified as to her compliance with each of the general and specific standards for obtaining an accessory apartment special exception. Tr. 15- 24. Specifically, there would be only one accessory apartment; the apartment would have at least one party wall in common with the main dwelling; the house was built in 1942; there is no family of unrelated persons on the premises; there are no rental uses on the premises other than the subject accessory apartment; there is a separate entrance for the accessory apartment that preserves the appearance of a single family home; there are no modifications planned to the external part of the house; the accessory apartment would have the same street address as the main dwelling; the accessory apartment would occupy around 450 square feet (*i.e.*, under 1200 sq ft); the owner, Ms. Moore, would occupy the main dwelling; more than a year has elapsed since the owner purchased the property;<sup>3</sup> compensation will be received by Petitioner for only one dwelling unit; the lot, being 10,886 square feet, exceeds the 6,000 square foot minimum lot size; she knows of only a couple of other special exceptions in the area; there is off-street parking in her driveway for three

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<sup>3</sup> Petitioner introduced a deed (Exhibit 13) showing that the property was conveyed to Petitioner on June 21, 1976.

or four cars;<sup>4</sup> the accessory apartment use is consistent with the applicable Master Plan, as far as Petitioner knows; the accessory apartment will be in harmony with the general character of neighborhood; the accessory apartment would not be detrimental to the use, peaceful enjoyment, value or development of the surrounding properties; there would be no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity; the accessory apartment would not alter the residential nature of the area, nor would it adversely affect the health, safety, security, morals or general welfare of the residents, visitors or workers in the area; it would be served by adequate public facilities; and traffic is not heavy on the one-block-long street on which she lives.

Petitioner executed an affidavit of posting (Exhibit 15), and introduced her deed to the premises (Exhibit 13) and a revised House Location Plat (Exhibit 14), as had been recommended by Technical Staff. Petitioner also agreed to meet all the conditions set forth in the Technical Staff Report (Exhibits 12 and 12(a)) and in the Housing Code Inspector's Report (Exhibit 11). Tr. 12.

Housing Code Inspector Wright A. Jolly, Jr. testified that Petitioner's property "is very beautiful," that the landscaping is "unbelievable," and that "it's got to be the best in the community . . . ." Tr. 24. He indicated that Petitioner was very cooperative, the notice sign was posted and the only problems he encountered in his inspection were those listed in his report (Exhibit 11).<sup>5</sup> Tr.

13. Mr. Jolly knew of the following accessory apartments in the neighborhood: 617 Ritchie Avenue, 705 Chesapeake Avenue<sup>6</sup> and an inactive one at 621 Potomac Avenue. He also observed that parking on the street would not create a parking problem for any of the nearby residents. Tr.

19. The record closed at close of business on the day of the Hearing.

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<sup>4</sup> The driveway is narrow, and it would block this elderly Petitioner's car in if the accessory apartment tenant were to routinely park in the driveway. Since the Housing Code Inspector testified that there is ample parking in the neighborhood, the Hearing Examiner does not recommend requiring Petitioner to allocate driveway space to the accessory apartment tenant.

<sup>5</sup> Petitioner has agreed to correct all problems (except the ceiling height, for which she obtained a waiver from DPS).

<sup>6</sup> The Chesapeake Avenue location is outside of the defined neighborhood in this case.

#### **IV. FINDINGS AND CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioner will have satisfied all the requirements to obtain the special exception, if she complies with the recommended conditions (Exhibits 12 and 12(a)).

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

##### **A. Standard for Evaluation**

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an accessory apartment.

Characteristics of the proposed accessory apartment that are consistent with the “necessarily associated” characteristics of accessory apartments will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with accessory apartments, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff lists for following inherent characteristics of accessory apartments:

the existence of the apartment as a separate entity from the main living unit but sharing a party wall with the main unit; the provision within the apartment of the necessary facilities and spaces and floor area to qualify as a habitable space under the Building Code; provision of a separate entrance and walkway, and sufficient lighting; provision of sufficient parking; the existence of an additional household on the site; additional activity from that household, including more use of the outdoor space and more pedestrian, traffic, and parking activity; and the potential for additional noise from that additional household.

The undersigned concludes that, in general, an accessory apartment has characteristics similar to a single family residence, with only a modest increase in traffic, parking and noise that would be consistent with a larger family occupying a single family residence. Thus, the inherent effects of an accessory apartment would include the fact that an additional resident (or residents) will be added to the neighborhood, with the concomitant possibility of an additional vehicle or two. That is the case here. There are no unusual characteristics of the site.

Based on the evidence in this case, and considering size, scale, scope, light, noise, traffic



and environment, I conclude, as did the Technical Staff, that there are no non-inherent adverse effects from the proposed use which would require denial of the petition.

### **B. General Conditions**

The general standards for a special exception are found in Zoning Code §59-G-1.21(a). The Technical Staff reports, the Housing Code Inspector's report, the exhibits in this case and the testimony of the Petitioner and the Housing Code Inspector provide ample evidence that the general standards would be satisfied in this case.

#### **Sec. 59-G-1.21. General conditions.**

**§5-G-1.21(a)** *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

*(1) Is a permissible special exception in the zone.*

Conclusion: An accessory apartment is a permissible special exception in the R-60 Zone, pursuant to Code § 59-C-1.31.

*(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.00 for an accessory apartment as outlined in Part C, below.

*(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use*

*objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The subject property is covered by the East Silver Spring Master Plan, Approved and Adopted in December 2000. As noted by Technical Staff, an important goal of the Plan is to “preserve existing residential character, encourage neighborhood reinvestment, and enhance the quality of life throughout East Silver Spring” (page 21). An accessory apartment does help preserve the residential character of the neighborhood and encourages residents to reinvest in their own property. Moreover, the Plan recommends retaining “the existing single-family detached character throughout most of East Silver Spring. . . .” (Page 26) Because Petitioner plans no external structural modifications to the subject property, the requested special exception will maintain the residential character of the area. Thus, it is fair to say that the planned use, an accessory apartment in a single family detached home, is not inconsistent with the applicable *Master Plan*. Moreover, the Technical Staff noted that the County Council is supportive of mechanisms to provide affordable housing in the County, and accessory apartments are one such mechanism. Thus, the Staff concludes, and the Hearing Examiner agrees, that the proposed use is consistent with the *Master Plan* and the *General Plan* for development in the County.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The proposed use will be in harmony with the general character of the

neighborhood because no structural change to the house is proposed. As to parking, Technical Staff determined that “parking on the driveway (and on the street) is adequate to accommodate this use.” The Petitioner and the Housing Code Inspector both testified that there was plenty of on-street parking available in the neighborhood. Thus, there should be no impact on the neighborhood as far as parking. The proposed use also will not generate any significant change in traffic conditions.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: There is no evidence in the record to contradict Petitioner’s testimony and the Technical Staff’s conclusion that there will be no adverse effects on the neighborhood due to the accessory apartment; nor will it be detrimental to the peaceful enjoyment, economic value or development of surrounding properties at the site. Therefore, the Hearing Examiner so finds.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Petitioner plans no external changes to her residence, and testified that the special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. There is no evidence to the contrary, and the Hearing Examiner so finds.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely*

*or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: There are three other active special exceptions in the area, and they are all accessory apartments. Neither the Technical Staff nor the Hearing Examiner believes that the proposed special exception will increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: The evidence supports the conclusion that the proposed special exception would be adequately served by the specified public services and facilities. The Technical Staff notes in its Report (Exhibit 12) that “[t]he adequacy of public facilities for the one-family detached dwelling on the subject property was determined at the time of subdivision review.”

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the*

*Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the public facilities review must include analysis of both the Local Area Transportation Review (“LATR”) and the Policy Area Transportation Review (“PATR”). The Technical Staff did do such a review, and concluded that the proposed accessory apartment use would add one additional trip during each of the peak hour weekday periods. Since the existing house, combined with the proposed accessory apartment, would generate fewer than 50 total trips in the weekday morning and evening peak hours, the requirements of the LATR are satisfied without a traffic study. See the July 2002 LATR Guidelines, of which the Hearing Examiner takes official notice.

Turning to the PATR, the FY 2004 Annual Growth Policy (“AGP”) transportation staging ceilings show remaining capacity of 2,332 housing units in the Silver Spring/Takoma Park policy area as of April 30, 2004, according to the Technical Staff report. Therefore, the Transportation Staff concludes, as does the Hearing Examiner, that the instant petition meets the PATR test, as well as the LATR test.

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

Conclusion: Based on the evidence of record, especially the Technical Staff's conclusion that the proposed use "will not reduce the safety of vehicular or pedestrian traffic," the Hearing Examiner so finds.

### **C. Specific Standards**

The testimony and the exhibits of record, especially the Technical Staff Reports (Exhibits 15 and 18) provide sufficient evidence that the specific standards required by Section 59-G-2.00 are satisfied in this case, as described below.

#### ***Sec. 59-G-2.00. Accessory apartment.***

*A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:*

##### ***(a) Dwelling unit requirements:***

*(1) Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.*

Conclusion: Only one accessory apartment is proposed.

*(2) The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:*

- (i) The lot is 2 acres or more in size; and*
- (ii) The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.*

Conclusion: The apartment is located in the basement of the house, and therefore shares a wall in common, as required for a lot of this size (under an acre).

*(3) An addition or extension to a main dwelling may be approved in*

*order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.*

Conclusion: No addition or extension of the main dwelling is proposed.

*(4) The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.*

Conclusion: The original house was built in 1942. It therefore meets the “5 year old” requirement.

*(5) The accessory apartment must not be located on a lot:*

- (i) That is occupied by a family of unrelated persons; or*
- (ii) Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or*
- (iii) That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

Conclusion: The proposed use does not violate any of the provisions of this subsection.

*(6) Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.*

Conclusion: Access to the accessory apartment is through a side door to the basement, which is not visible from the street. There will be no change to the residential appearance of the dwelling.

*(7) All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.*

Conclusion: No external modifications are proposed.

*(8) The accessory apartment must have the same street address (house number) as the main dwelling.*

Conclusion: The accessory apartment will have the same address as the main dwelling.

*(9) The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet.*

Conclusion: The accessory apartment is clearly subordinate to the main dwelling, as it occupies approximately 450 square feet in the basement of Petitioner's home.

**59-G § 2.00(b) Ownership Requirements**

(1) *The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.*

Conclusion: The Petitioner lives in the main dwelling and plans to continue living there.

(2) *Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the Petitioner, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.*

Conclusion: The Petitioner acquired the property in 1976 according to the deed (Exhibit 13), easily more than one year before the filing of the petition.

(3) *Under no circumstances, is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.*

Conclusion: The Petitioner will receive compensation for only one dwelling unit.

(4) *For purposes of this section owner means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the Board.*

Conclusion: The Petitioner is the owner of the property.

(5) *The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.*

Conclusion: Not applicable

**59-G § 2.00(c) Land Use Requirements**

(1) *The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more*



*than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.*

**Conclusion:** The subject lot is approximately 10,886 square feet in size. The following chart from page 7 of the Technical Staff Report (Exhibit 12) demonstrates compliance with all development standards:

<b>Development Standard – “A” Residence Zone per 1928 Ordinance/R-60/Acc. Apt.</b>	<b>Required/ Allowed</b>	<b>Provided</b>	<b>Compliance</b>
Maximum Building Height: (R-60)	2.5 stories or 35 feet	1 story	Yes
Minimum Lot Area: (Acc. Apt.)	6000 s.f.	10,886 s.f.	Yes
Minimum Width at Front Building Line: (“A” Residence Zone – 1928)	50 feet	50 feet	Yes
Minimum Width at Proposed Street Line: (“A” Residence Zone – 1928)	No standard in 1928 [R-60 standard is 25 feet]	50 feet	Yes
Minimum Front Yard Setback: (“A” Residence Zone – 1928)	25 feet (see 1928 Ordinance for full quote of standard, which has more provisions)	@33.33 feet	Yes
Minimum Side Yard Setback: (“A” Residence Zone)	7 feet each side	@11.66 feet, @8.33 feet	Yes
Minimum Rear Yard Setback: (“A” Residence Zone)	20 feet	@153.33 feet	Yes
Maximum Building Coverage: (R-60)	35%	<35%	Yes
Maximum Floor Area for Accessory Apartment: (Acc. Apt.)	1200 s.f.	@ 450 s.f., not including shared portion of laundry/storage area	Yes

- (2) An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in excessive concentration of similar uses, including other special exception uses, in the general neighborhood of the proposed use (see also section G-1.21 (a)(7) which concerns excessive concentration of special exceptions in general).*

Conclusion: There are three other active accessory apartments in the area. Both the Technical Staff and the Hearing Examiner conclude that the proposed special exception will not create an excessive concentration of similar uses.

- (3) Adequate parking must be provided. There must be a minimum of 2 off-street parking spaces unless the Board makes either of the following findings:*
- (i) More spaces are required to supplement on-street parking; or*
  - (ii) Adequate on-street parking permits fewer off-street spaces.*

*Off-street parking spaces may be in a driveway but otherwise must not be located in the yard area between the front of the house and the street right-of-way line.*

Conclusion: There are at least three off-street parking spaces in Petitioner's driveway. Moreover, there is sufficient on-street parking to accommodate the proposed use, according to all the evidence.

#### **D. Additional Applicable Standards**

Not only must an accessory apartment comply with the zoning requirements as set forth in 59-G, it must also be approved for habitation by the Department of Housing and Community Affairs. As discussed in Part II. B. of this Report, the Housing Code Inspector's report (Exhibit 11) notes certain issues, and has recommended that occupation of the accessory apartment be limited to no more than two persons. As noted above, Petitioner has agreed to meet all conditions, except the ceiling height condition for which DPS has granted her a waiver.

## V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2603 for a special exception for an accessory apartment located at 626 Potomac Avenue, Silver Spring, Maryland, be GRANTED, with the following conditions:

1. The Petitioner is bound by Petitioner's testimony, representations and exhibits of record;

2. The Petitioner is bound by the conditions set out in the Memorandum of Wright A. Jolly, Jr., Housing Code Inspector, Division of Housing and Code Enforcement (Exhibit 11), that Petitioner will house no more than two persons in the accessory apartment; will install a stove with an oven in the kitchen; will install a guardrail with balustrades around the front entrance stairwell; and will properly support and secure the loose counter and counter top.

3. Petitioner must occupy one of the dwelling units on the lot on which the accessory apartment is located; and

4. Petitioner must not receive compensation for the occupancy of more than one dwelling unit.

Dated: June 30, 2004

Respectfully submitted,

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Martin L. Grossman  
Hearing Examiner